AMPAT TIN DREDGING LTD.

v.

DIRECTOR-GENERAL OF INLAND REVENUE

HIGH COURT MALAYA, KUALA LUMPUR
MOHD. AZMI J
[ORIGINATING MOTION NO. 9 OF 1976]
2 OCTOBER 1981

REVENUE LAW: *Tax payer's adjusted income - Outgoings and expenses to be allowed for deduction - Section 33(1) Income Tax Act 1967 - Retrenchment benefits paid on closure of company - Whether wholly and exclusively incurred in the production of gross income - Whether deductible.*

This was an appeal by way of case stated against the decision of the Special Commissioners of Income Tax holding that in the ascertainment of the appellant's income for the year 1971, the sum of RM 247,838 paid out by the appellant by way of retrenchment benefits to its employees (the disputed sum) was not deductible under the provisions of s. 33(1) of the Income Tax Act 1967 (the Act). The facts showed that the appellant's mining operation had ceased in July 1970, and following that, pursuant to the terms of the agreements between the Malayan Mining Employers' Association, of which the appellant was a member, and two trade unions representing the appellant's employees, retrenchment benefits were paid out to various employees of the appellant between July 1970 and November 1970. It was not in dispute that not long after that, in April 1971, the appellant went into voluntary liquidation.

Section 33(1) of the Act stipulates "Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained **by deducting from the gross income** of that person from that source for that period **all outgoings and expenses wholly and exclusively incurred** during that period by that person **in the production of gross income** from the source ...". The Special Commissioners, in coming to their conclusion, took the view that the disputed sum were paid out because the appellant was going out of business, and so, fell outside the ambit of the words "outgoings and expenses wholly and exclusively incurred in the production of gross income" in s. 33(1). Before the learned Judge herein, the appellant argued, *inter alia*, that the purpose of the agreements to pay retrenchment benefits on cessation of business was to keep the company in efficient condition till the end, and on this score, the disputed sum ought to be made deductible being an expense for continuation of business in the production of income.

Held:

[1] It is a well settled principle of law that the rule of strict construction must be applied in interpretation of statutes which impose pecuniary burden on the subject. The principle of all fiscal legislation is that, if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.

[2] There should be no room for doubt as to what s. 33(1) Income Tax Act 1967 requires, as regards deductions that can be made in ascertaining a taxpayer's adjusted income from a source for a particular taxing year. from the clear words of s. 33(1), in order for outgoings and expenses to be allowed as deductions they must be wholly and exclusively incurred in the production of gross income.

[3] The Court is only concerned with the interpretation and application of the law as it stands. Unless the money is incurred wholly and exclusively in the production of gross income, it is not deductible however apparently within the spirit of s. 33(1) the case might appear to be.

[4] In the present case, the money expended on retrenchment benefits to the appellant's employees before its winding-up cannot possibly be said to have been "wholly and exclusively incurred in the production of gross income" within the ambit of s. 33(1) of the Income Tax Act 1967. Merely because the company was under contractual obligation to make the payment, or it was a good policy to provide for and make such payment, or the fact that an annual provision had been made in the company's accounts for such an eventuality and that the company had not claimed for deduction in it because the liability had not crystallised, are matters which the Court cannot take into consideration. These matters should properly be dealt with by the legislature.

[5] To qualify for deduction, it is not sufficient that the money incurred is related to the production of income, but it must be wholly and exclusively incurred in the production of income. In the present case, for work done, all the appellant's employees were paid wages for which deduction had been allowed. At the most, the retrenchment benefits expended can only be said to be related to the production of income but not exclusively in the production of income.

[6] The question whether money is "wholly and exclusively incurred in the production of gross income" within the meaning of s. 33(1) of the Income Tax Act 1967, is a question of fact to be decided on the circumstances of each case. In this particular case, on the facts before the Special Commissioners, there was sufficient evidence to support their decision, and they are correct in law that the disputed sum is not deductible under s. 33(1) of the Income Tax Act 1967.

[Appeal dismissed.]

Cases referred to:
Oriental Bank v. Wright [1879] 5 AC 842
Partington v. Attorney-General LR 4 AC 100
Cape Brandy Syndicate v. Inland Revenue Commissioners [1921] 1 KB 64; [1921] 12 TC 358
Ward & Co. Ltd. v. Commissioner of Taxes [1923] AC 145
Strong & Co. of Romsey Ltd. v. Woodifield [1906] AC 448; 5 TC 215
Rowntree & Co. Ltd. v. Curtis 8 TC 678
Smith's Potato Estates Ltd. & Smith's Potato Crisps (1929) Ltd. 30 TC 267
Commissioner of Taxes v. Nchanga Consolidated Copper Mines Ltd. [1964] 1 All ER 208
W. Nevill & Co. Ltd. v. Federal Commissioner of Taxation 56 CLR 290
Commissioners of Inland Revenue v. Anglo-Brewing Co. Ltd. 12 TC 803
Godden v. A. Wilson's Stores (Holdings) Ltd. 40 TC 161
Maryborough Newspaper Co. Ltd. v. Federal Commissioner of Taxation 43 CLR 450
Royal Insurance Co. v. Watson 3 TC 500
B.W. Noble Ltd. v. Mitchell 11 TC 372
Smith v. Incorporated Council of Law Reporting for England and Wales 6 TC 477
Atherton v. British Insulated & Helsby Cables Ltd. 10 TC 155
Owen v. Southern Railway of Peru Ltd. 36 TC 602

Legislation referred to:
Income Tax Act 1952 [UK], s. 137, (a)
Income Tax Act 1967, s. 33(1)
Land and Income Tax Act 1916 [NZ], s. 86(1)(a)

For the appellant - Peter Mooney; M/s Skrine & Co.
For the respondent - Alauddin bin Mohamed Shariff, SFC

JUDGMENT

Mohd. Azmi J:

This is an appeal by way of case stated against the decision of the Special Commissioners of Income Tax in holding that, in the ascertainment of the taxpayer company's income for the year of assessment 1971, the sum of RM247,838 paid by way of retrenchment benefits was not deductible under the provisions of s. 33(1) of the Income Tax Act 1967.

In accordance with the evidence and statement of agreed facts, the appellant taxpayer is a tin mining company which has gone into liquidation because of the exhaustion of its tin ore reserve. Mining operation ceased on 24 July 1970 and the company went into voluntary liquidation on 29 April 1971. (See AB19). Payments of retrenchment benefits were made to the various employees between July and November 1970 in accordance with the terms of two agreements between the Malayan Mining Employers' Association, of which the company was a member, and two trade unions representing the employees, entered into by the parties in 1967. The taxpayer company claims that for the assessment year 1971, it is entitled to deduct those 1970 payments from its gross income as being "outgoings and expenses wholly and exclusively incurred in the production of gross income" within the meaning of s. 33(1) of the Income Tax Act 1967. However, the Special Commissioners have disallowed these deductions on the ground that these sums were not paid out in order to produce income but because the taxpayer was going out of business.

The sole question for determination in this appeal is whether the sum of RM247,838 paid by way of retrenchment benefits is deductible from the taxpayer's gross income as being "outgoings and expenses wholly and exclusively incurred in the production of gross income". The question of law for the opinion of this Court is whether on the facts before the Special Commissioners, there was evidence to support their decision and whether it was correct in law.

It is necessary to stress at this stage that it is for the taxpayer company to show by evidence that the payment of RM247,838 (hereinafter referred to as "the disputed sum") are outgoings and expenses wholly and exclusively incurred in the production of gross income. The evidence disclose that the payments in the form of retrenchment benefits were made in 1970 pursuant to contractual obligation incurred in 1967 which stipulated that an employee "shall qualify for retirement benefit:

(a) if he has fully attained the age of 55 and has completed not less than 10 years' continuous service with the company or

(b) if he has completed 5 years' continuous service with the company but not having attained the age of 55 and is certified by the company's medical officer as incapable of carrying out his employment and permanently unfit for any further employment within the mining industry or

(c) if he dies whilst in the service of the company or

(d) if he is retrenched due to the closure of a mine or redundancy.

It is pertinent to note that except for the first limb of eventuality (d), all the other situations pose no real problem since any retrenchment benefit made under them may in appropriate cases be proved to have been incurred wholly and exclusively in the production of the taxpayer's gross income. It seems to me that (a), (b) and (c) have one thing in common, *viz.* the payment would be made not with a view of cessation of business but rather for continuation of business in the production of income, whereas the first limb of (d) is expressly

for the purpose of cessation of business although the second limb, as regards redundancy, it might be envisaged that the business would still continue. Thus, when we talk retrenchment benefits under the two agreements in this appeal, we are in fact talking about five eventualities when the taxpayer company was obliged to make payments. Further, in the present case, a retrenchment could occur either due to closure of the mine, i.e. closure of business (which is the relevant part of the agreements with which we are concerned) or due to redundancy. When the retrenchment benefits were paid due to redundancy, they should in appropriate cases be deductible as the taxpayer company would be able to prove that the sum is expended for the purpose of saving the company from extinction and, therefore, deductible as money incurred exclusively in the production of income. But, in the case of retrenchment due to closure of business, it seems to me that the purpose of incurring the expenses or outgoings has nothing to do with the production of income. We are not here concerned with the whole agreements, but only to a particular clause regarding closure of the mine. The purpose is expressly stated in the first limb of Clause 19(d) of the first agreement (AB6) and Clause 3(iv) of the second agreement (AB17), *viz.* "due to closure of the mine", which the parties must have intended to mean that in the event of cessation of business, the employer is entitled to retrench the employees and, in return, the employer is obliged to pay them retirement benefits. In that situation, it is clearly intended that the employer would cease business and, as such, would cease in the production of income. This does not however mean that any payment of retrenchment benefit is *ispo facto* excluded from eligibility for deduction. It depends both on the immediate reason for the payment and as well as the purpose for which the liability was incurred. If both are not wholly and exclusively incurred for the purpose of production of income, then the payment is not deductible. For instance, if the retrenchment benefits in this case had been paid due to redundancy, then the payments might have been deductible as both the immediate reason for payment and the purpose for which the liability was incurred are to ensure that business would continue in the production of income despite unfavourable economic conditions. It is different in the case of cessation of business because both the obligation incurred and the cause of immediate payment have nothing to do with the production of income, or at least not wholly or exclusively for the production of income. These are the circumstances of the case, apart from other facts as found by the Special Commissioners in the case stated, in which the present appeal must be considered in determining whether the Special Commissioners' decision in holding that the disputed sum is not deductible, is correct in law. We must determine what is the precise nature and purpose of this particular retrenchment benefit.

In this case, we are dealing with the provision of s. 33(1) of Income Tax Act 1967, the relevant parts of which read:

> Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained **by deducting from the gross income** of that person from that source for that period **all outgoings and expenses wholly and exclusively incurred** during that period by that person **in the production of gross income** from that **source** ..." (The emphasis is mine).

As I have occasion to state in the past that it is a well settled principle of law that the rule of strict construction must be applied in interpretation of statutes which impose pecuniary burden on the subject. If a statute professes to impose a charge, "the rule", said the Judicial Committee in *Oriental Bank v. Wright* [1879] AC 842, 856 is "that the intention to impose a charge upon a subject must be shown by clear and unambiguous language". In *Partington v. Attorney General,* LR 4 AC 100, 122 Lord Cairns said:

> I am not at all sure that, in a case of this kind - a fiscal case - form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

It is also appropriate to refer to the often quoted words of Rowlatt J in *Cape Brandy Syndicate v. Inland Revenue, Commissioners* [1921] 1 KB 64, 69, 71; [1921] 12 TC 358, 366:

> ... in a taxing Act clear words are necessary to tax the subject. But it is often endeavoured to give to that maxim a wide and fanciful construction. It does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the Crown in such Acts. It means this, I think; it means that in taxation you have to look simply at what is clearly said. There is no room for any intendment; there is no equity about a tax: there is no presumption as to a tax; you read nothing in; you imply nothing, but you look fairly at what is said and at what is said clearly and that is the tax.

Applying the above principles of construction of fiscal legislation to the present case, there should be no room for doubt as to what s. 33(1) Income Tax Act 1967 requires, as regards deductions that can be made in ascertaining a taxpayer's adjusted income from a source for a particular taxing year. From the clear, words of s. 33(1), in order for outgoings and expenses to be allowed as deductions they must be wholly and exclusively incurred in the production of gross income. References to English, Australian and New Zealand authorities, particularly Privy Council decisions, are of course helpful and necessary. Although the English cases cited by learned Counsel for the appellant company are based on s. 137(a) of the English Income Tax Act 1952 - which is not in *pari materia* with our provision - the principles enunciated therein are indeed of great value to this Court, provided they have some bearing upon the case under consideration and any difference in the statutory provisions must be given due consideration before they are applied. In this connection, I agree with Counsel for the appellant/taxpayer company that the view expressed by their Lordships the Privy Councillors in *Ward & Co. Ltd. v. Commissioner of Taxes* [1923] AC 145, 150 to the effect that "decisions of the English Income Tax Acts, the language of which is different from that of the New Zealand Act, have no bearing upon the question now under decision", should not be taken as an authority for excluding all English authorities from consideration. The material difference is that the English s. 137 refers to "disbursement or expenses ... wholly and exclusively laid out or expended for the purpose of trade, profession or vocation", as distinguished from our s. 33(1) which provides for "outgoings and expenses wholly and exclusively incurred **in the production of gross income**". Giving the words their ordinary dictionary meaning, I am of the view the term "laid out or expended for the purpose of trade, profession or vocation" seems wider than "incurred ... in the production of gross income", even though the former term has been judicially interpreted to mean "for the purposes of earning profits. (See *Strong & Co. of Romsey Ltd. v. Woodifield* [1906] AC 448, 453; 5 TC 215, 220; *Rowntree & Co. Ltd. v. Curtis* 8 TC 678, 696; *Smith's Potato Estates Ltd. & Smith's Potato Crisps (1929) Ltd.* 30 TC 267, 292; *Commissioner of Taxes v. Nchanga Consolidated Copper Mines Ltd.* [1964] 1 All ER 208, 209. On the authority of Australian case *W. Nevill & Co. Ltd. v. Federal Commissioner of Taxation* 56 CLR 290, it is argued on behalf of appellant company that "production of gross income" means "for purpose of earning profit". With respect, I do not think this is a proper way of interpreting s. 33(1) of our Act. As was held by Rowlatt J in *Cape Brandy Syndicate* case (*ante*), in taxing legislation, there is no

room for any intendment: there is no equity about a tax: there is no presumption as to a tax: you read nothing and you imply nothing. If our legislators had wanted to apply English s. 137(a) or New Zealand or Australian version of the section, they would have adopted that provision and used clear words to that effect. But our legislature has chosen the words "wholly and exclusively incurred in the production of gross income" which appear to be more restrictive than the English provision on the issue of deductibility.

In this case, numerous cases have been cited by Counsel for the appellant/taxpayer company involving decisions where deduction had been allowed and as well as where it was held otherwise. I hope I will be forgiven for not mentioning each of them in detail, but suffice for me to say that except in two cases (*The Commissioner of Inland Revenue v. Anglo Brewing Co. Ltd.* 12 TC 803 and *Godden v. A. Wilson's Stores (Holdings) Ltd.* 40 TC 161 all the others are not concerned with payment on the cessation of the taxpayer's business. In both these cases (which are relevant to the present case), the expenses were found not wholly and exclusively laid out or expended for the purpose of trade, and the money was held to be not an allowable deduction. The appellant, of course, seeks to distinguish them on the facts, and it is pointed out that the payment in the present case has many of the characteristics which are found in the cases where deductions have been held justified. But on perusal of these cases (*Maryborough Newspaper Co. Ltd. v. Federal Commissioner of Taxation* 43 CLR 450; *Royal Insurance Co. v. Watson* 3 TC 500) and *B.W. Noble Ltd. v. Mitchell* 11 TC 372) payments were held to be for the purpose of trade because they were expended for the purpose of getting rid of unwanted directors or employees of the taxpayer company either to improve efficiency or to avoid adverse consequences to the business of the company. In none of them including *Smith v. Incorporated Council of Law Reporting for England and Wales* 6 TC 477 the liability was incurred or payment was made, pending or in the expectation of liquidation either voluntary or otherwise. In all the cases where deduction was not allowed, the evidence showed that the money expended, even though for the benefit of the company's employees or even if made gratuitously or under statutory obligation, was not for the purpose of trade. (See *Atherton v. British Insulated & Helsby Cables, Ltd.* 10 TC 155; *Owen v. Southern Railway of Peru Ltd.* 36 TC 602 and *Royal Insurance v. Watson* (*ante*).)

In *Ward v. Commissioner of Tax* (*ante*), a New Zealand brewery company claimed deduction in respect of expenses incurred in the advertising, canvassing and printing of anti-prohibition literature during a poll on a question of whether or not prohibition of intoxicants should be introduced. Although the poll resulted in a small majority against prohibition, it was held by the Judicial Committee that the company was not entitled to make the deduction having regard to s. 86(1)(a) of the Land and Income Tax Act 1916 of New Zealand which provides that no deduction is to be made in respect of expenditure "not exclusively incurred in the production of the assessable income". In the course of their Lordships' judgment, the following passage of the New Zealand Court of Appeal judgment was quoted with approval:

> The question, therefore, is: Was the expenditure under consideration exclusively incurred in the production of the assessable income for unless it was so, the Act expressly prohibits its deduction from such income. This question must, we think, be answered in the negative. We find it quite impossible to hold that the expenditure was incurred exclusively, or at all, in the production of the assessable income. It was incurred not for the production of income, but for the purpose of preventing the extinction of the business from which the income was derived, which is quite a different thing. It was contended by the company that it was illogical that while legitimate expenses incurred in the production of the income are deductible, similar expenses incurred for the much more important purpose of keeping the profit-making business, alive are not deductible, and, further, that it was, that the Legislature should, on the one hand, force a certain class of traders into a struggle for their very existence, and, on the other hand,

> treat the reasonable expenses incurred in connection with such struggle as part of the profits assessable to income tax. These aspects of the matter are clearly and forcibly set out in the contentions of the company as embodied in the correspondence with the Commissioner contained in the case, but they raise questions which can only be dealt with appropriately by the Legislature. This Court, however, cannot be influenced by such considerations, being concerned only with the interpretation and application of the law as it stands.

Similarly, in the present case, the money, expended on retrenchment benefits to the company's employees before winding-up its business cannot possibly be said to have been "wholly and exclusively incurred in the production of gross income" within the ambit of s. 33(1) of the Income Tax Act 1967. Merely because the company was under contractual obligation to make the payment; or it was a good policy to provide for and make such payment in the tin mining industry; or the fact that an annual provision had been made in the company's accounts for such an eventuality and that the company had not claimed for deduction in it because the liability had not crystallized, are matters which the Court cannot take into consideration as they should properly be dealt with by the legislature. The Court is only concerned, as was held in *Ward* case, with the interpretation and application of the law as it stands. Unless the money is incurred wholly and exclusively in the production of gross income, it is not deductible however apparently within the spirit of s. 33(1) the case might appear to be. The fact that the taxpayer company could predict its own demise and made such contractual, provisions for payment to its employees in that eventuality, and did make such payment before its extinction, cannot, in my view, bring the case within the ambit of s. 33(1). Such expenses and outgoings cannot be said to have been incurred wholly or exclusively in the production of income. As has been expressly stated in the two agreements, the benefits were meant to be given if the employees were retrenched due to closure of the tin mine. To qualify for deduction, it is not sufficient that the money incurred is related to the production of income, but it must be wholly and exclusively incurred in the production of income. In the present case, for work done, all the company's employees were paid salaries or wages for which deduction had been allowed. At the most, the, retrenchment benefits expended can only be said to be related to the production of income but not exclusively in the production of income.

It is argued by the taxpayer company that the purpose of the two 1967 agreements to pay retrenchment benefits on cessation of business was to keep the company in efficient condition till the end, and as such the money expended for this purpose is deductible. In support of this proposition, a number of cases have been cited. In *Maryborough Newspaper Co. Ltd. v. The Federal Commissioner of Taxation* (*ante*), the High Court of Australia held that an **allowance** paid to one editor in order to persuade him to retire which was **in the interest of the newspaper**, was deductible. But in *Royal Insurance Co. v. Watson* (*ante*), the House of Lords held that money paid to the manager of a company acquired by the taxpayer company was part of the consideration for the transfer of business, therefore being capital expenditure, could not be deductible. In *Noble v. Mitchell* (*ante*), **voluntary payment under an agreement** by the taxpayer company to a retiring director was held to be deductible on the ground that the **retirement could bring direct and immediate benefit** to its business. Common to all these cases and other cases cited by Counsel for taxpayer company where the payment was held to be attributed to revenue and not a capital expenditure, is the fact that the money was expended for the purpose of getting rid of a director or servant of the taxpayer company when it is not expedient to keep him **in the interests of the company's business**. The object is not for the extinction or the expected extinction of the business as in the present case, but rather to save the business from extinction. In the present case, it is not only the immediate reason for the payment in 1970 that has nothing to do in the production of income.

In fact, the liability was incurred mainly in the expectation of the company's total extinction, and, having regard to tin deposit areas still available in this country, I fail to see how it is in the interest of the mining industry for mining companies to wind-up business completely merely because of exhaustion of tin ore reserve in a particular mine. As stated earlier, it is different in the case of money expended due to redundancy or payment of benefits in the case of employees' retirement due to old age or sickness or in the case of death. In such cases, both the immediate reason for payment and the purpose for which the liability was incurred could in appropriate cases be shown to be wholly and exclusively incurred in the production of gross income and therefore deductible. Thus, in *Godden v. A. Wilson's Stores (Holdings), Ltd.* (*ante*) the respondent company (formerly the Morib Plantation Ltd.), a company incorporated in UK was the owner of a rubber estate in Malaya. It carried on the trade of rubber planter till 31 March 1958 on which date the trade was discontinued. In terminating the employment of the estate manager, the company failed to give the contractual six months' notice, and with his agreement, in lieu of the said notice, he was paid the sum of £1,900 on 28 March 1958 representing the salary due to him for the six months to 30 September 1958. On appeal by Revenue against the decision of the Special Commissioners in holding that the sum of £1,900 was deductible being money incurred for the purpose of the company's trade to break a trading obligation, Plowman J held that the payment was not made for the purpose of enabling a person to carry on and earn profits in the trade and was not therefore an allowable deduction. On further appeal, in upholding the decision of Plowman J, the Court of Appeal (Lord Evershed MR and Upjohn and Diplock LJJ) held that the money was not "wholly and exclusively laid out or expended for the purpose of trade", within the meaning of s. 137 of the English Income Tax Act 1952. Their Lordships also approved the judgment of Lord Davey in Strong & Co. of *Romsey Ltd. v. Woodfield* (*ante*) that "It is not enough that the disbursement is made in the course of, or arises out of, or is connected with the trade, or is made out of profits of the trade. It must be made for the purpose of earning the profits. Similarly, in the present case, although the two agreements were made between management and trade unions well before the disputed sum was expended, it does not follow that all the contents of the agreements were made wholly and exclusively for the production of gross income. In fact, such agreements are made more for the purpose of industrial peace than anything else. There should be no confusion between the purpose of the agreements and the purpose of the particular provisions in the agreement with which we are now dealing. The first limb of Clause 19(1)(d) of the first agreement (AB6) and the first limb of Clause 3(iv) of the second agreement (AB17) relating to retrenchment due to the closure of a mine (the relevant provision with which we are concerned) is clearly not wholly and exclusively intended in the production of gross income. In my view, it has very little to do with the production of income but it has everything to do with the extinction or expected extinction of the taxpayer company's business. At the most, those particular provisions in the two agreements are only connected with the gross income and are made out of profits of the income which, in law, is insufficient for the purpose of deduction under s. 33(1) of the Income Tax Act 1967. It is interesting to note that the argument advanced on behalf of the taxpayer company as regards the purpose of the agreement as being necessary to keep the mining business efficient till its extinction, was similarly advanced in *Godden's* case (*ante*) at pp. 173 and 174. It was argued that the sum of £1,900 was in reality paid to keep the estate manager working hard in the interest of the company until cessation of business on 31 March 1958 when the new owners would take over. The Court of Appeal rejected this argument, as the intention of the parties was clear that the payment was made in lieu of notice. Similarly, in the present case, what the parties intended to do is clearly expressed in the first limb of Clause 19(1)(d) of Clause 3(iv) of the agreements, and the cessation of business is in fact the expected and immediate cause of the payment. Again, in *Commissioner of Inland Revenue*

v. The Anglo Brewing Co. Ltd. (*ante*), Rowlatt J held *ex gratia* payments to employees by a company of carrying on the company's trade and that they were not deductible. In my view, this is a clear case to illustrate that money paid because the company was not going to carry on the business anymore is not deductible even though the payment was intended to be *ex gratia* and the company had made similar payments in the past when it was a going concern, to servants of long service who had left their employment.

From the authorities cited, in particular *Mayborough Newspaper Co. Ltd. v. The Federal Commissioner of Taxation* (*ante*) and *Smith v. Incorporated Council of Law Reporting for England and Wales* (*ante*), I hold that, in the final analysis, the question whether money is "wholly and exclusively incurred in the production of gross income", within the meaning of s. 33(1) of the Income Tax Act 1967, is a question of fact to be decided on the circumstances of each case, and it is on the finding of these facts that a conclusion of law is arrived at. In this particular case, I am of the view that on the facts before the Special Commissioners, there was sufficient evidence to support their decision, and they are correct in law that the disputed sum is not deductible under s. 33(1) of the Income Tax Act 1967.

This appeal is accordingly dismissed with costs.

Also found at [1982] CLJ 193